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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 971.

NATIONAL BANK OF MIDDLESBORO AND H. C. WILLIAMS, Successor Assignee, etc., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No. ——.

NATIONAL BANK OF MIDDLESBORO AND H. C. WILLIAMS, Successor Assignee, etc., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioners, National Bank of Middlesboro, a corporation, and H. C. Williams, Successor Assignee in Trust for the Benefit of the Creditors and Stockholders of Louisville Property Company, pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled cause on February 7, 1944.

OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court of the United States for the Eastern District of Kentucky (R. 101-104) are not officially reported. The opinion of the Circuit Court of Appeals (R. 116-122) is reported at 140 F. 2d 547.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on February 7, 1944 (R. 115). The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Is a final decision of the Board of Tax Appeals, dismissing a petition on the ground that the petitioner is not the taxpayer against whom the tax was asserted, *res judicata* and binding upon the Courts when the government seeks to levy upon the property of the petitioner to collect taxes asserted against the said taxpayer?

2. When a corporation quits business and makes an assignment in trust of all its property for the benefit of its creditors, with any remainder over after its creditors are satisfied to go to its stockholders, is the assignee in trust "operating the property or business" *of the corporation* within the meaning of § 52 of the Revenue Act of 1936 so as to require him to render corporation returns of income and pay income taxes at corporation rates?

STATUTES INVOLVED.

The statutes involved are §§ 52, 142, and 161 of the Revenue Act of 1936 and §§ 1117, 1140, and 1142 of the Internal Revenue Code. The pertinent parts of these are printed in the Appendix, *infra*, pages 15 to 17.

STATEMENT OF THE CASE.

The Louisville Property Company, a corporation, was organized in 1898 for the purpose of owning and dealing in real estate. In 1919 it was involved in financial difficulties which resulted in a court order that it be liquidated and that, pending liquidation, it be placed in receivership. *Bernheim* v. *Louisville Property Co.*, 185 Ky. 63, 214 S. W. 801.

The interested parties all realized that receivership would dissipate the assets and agreed upon a plan whereby the Louisville Property Company assigned and conveyed in fee simple all of its property in trust for the benefit of its creditors, with any remainder over to go to its stockholders or their successors and assigns. (R. 89, 94-96.) The Company then published notice that it had *quit business and was winding up its affairs.* Since that time, it has had no property and has not engaged in business, but the corporation has been kept alive *solely* for the purpose of maintaining a register of the stockholders to be used in the case of distributions by the trustee. (R. 89-90.) A TRUST COMPANY administered the assets until in 1935 when it asked the Whitley Circuit Court (of Kentucky) to be discharged from its trust. The request was granted and on May 11, 1935, H. C. Williams of Middlesboro, Kentucky, was designated by said Court as successor assignee in trust and was directed to administer the remaining properties of the trust in accordance with the original terms of the trust created in 1919. The Circuit Court ordered that the action should be retained on its docket for such further proceedings as might be necessary and for settlement of the accounts of H. C. Williams and further ordered that the action proceed under the style of "H. C. Williams, Assignee of Louisville Property Company, et al." (R. 90.)

H. C. Williams has administered the assets since that time and has used the title which the court assigned to him. He has disposed of the assets from time to time as he could

without sacrificing them and has made regular reports to the court. H. C. Williams was not an officer, director, or stockholder of Louisville Property Company and made no reports to it. It made no demands upon him and has not exercised any authority over the assets conveyed to him. (R. 90-91.)

H. C. Williams has rendered income tax returns for the trust each year since he has been trustee. He used the fiduciary forms prescribed by the Commissioner of Internal Revenue for trusts and used the title fixed by the Court of "H. C. Williams, Assignee, Louisville Property Company". His return for 1937 disclosed a tax liability of $361.55, which tax he paid. (R. 91.)

The Commissioner of Internal Revenue held that H. C. Williams was operating the business or property of the corporation, Louisville Property Company, and that his income should be taxed at corporate rates (R. 22-26). He proceeded to compute the income tax on the corporate basis and arrived at a total tax liability for 1937 of $2,139.08. The Commissioner then mailed a statutory deficiency letter to "Louisville Property Company, H. C. Williams, Assignee, Middlesboro, Kentucky," giving notice therein of his determination (R. 22-26). Said letter was received by H. C. Williams, who, to protect his rights and the rights of the beneficiaries whom he represented, appealed therefrom to the Board of Tax Appeals (R. 16-26). The petition was captioned "H. C. Williams, Successor Assignee in Trust for the Benefit of the creditors and stockholders of Louisville Property Company, Petitioner, v. Commissioner of Internal Revenue", and was given Docket No. 100,467. Said petition alleged that "in so far as said notice of deficiency is held to assert a deficiency in tax against this petitioner, petitioner hereby petitions for a redetermination" (R. 16, 91-92).

The Commissioner of Internal Revenue filed a motion to dismiss the petition on sundry grounds (R. 27-28). After hearing on the motion, the Board on December 20, 1939,

entered an order of dismissal in which it dismissed the proceeding for lack of jurisdiction, because the tax was asserted against a corporation and the petition was filed by *a wholly different person* (R. 28-29). No appeal was taken from this order (R. 94).

After the Board's order of dismissal had become final, the Commissioner of Internal Revenue, made an assessment (R. 57) of tax against "Louisville Property Company, H. C. Williams, Assignee, Middlesboro, Kentucky" and sent a notice and demand for payment of this tax to H. C. Williams. Subsequently a distraint warrant drawn on "Louisville Property Company, H. C. Williams, Assignee, Middlesboro, Kentucky," for the amount of tax alleged to be due was served on him by a deputy collector (R. 92).

H. C. Williams refused to pay upon demand and distraint by the collector, and in May, 1941, the collector levied upon and seized an account of "H. C. Williams, Assignee, Louisville Property Company" in the National Bank of Middlesboro, Kentucky, in the amount of $2,131.58 for said assessment. H. C. Williams, etc., notified the bank that he was not liable for the tax assessed against Louisville Property Company, etc., and that it should not pay over the account to the collector (R. 92, 102).

On May 2, 1942, the United States filed suit in the District Court of the United States for the Eastern District of Kentucky against the National Bank of Middlesboro to compel it to turn over the said account (R. 1-3). Defendant answered that it had no account in the name of "Louisville Property Company, H. C. Williams, Assignee," but did have an account in the name of "H. C. Williams, Assignee, Louisville Property Company"; that it did not know the legal distinction between the one name and the other; and that it had no personal interest in the controversy and prayed the Court to instruct it in the premises (R. 4-6).

On July 8, 1942, H. C. Williams, Assignee, Louisville Property Company, filed a motion to intervene as the real

party in interest (R. 7-8) and tendered therewith its "Intervenor's Answer" (R. 9-29).

On August 4, 1942, the Court granted intervenor's motion to intervene and ordered the said intervenor's answer to be filed (R. 30).

Plaintiff thereafter filed a motion for summary judgment and attached thereto certain documents as evidence (R. 38-79). Intervenor also filed a motion for summary judgment with certain documentary evidence attached (R. 85-97). Plaintiff then made a request for admissions from intervenor under Rule 36 (R. 97-99) and intervenor replied thereto (R. 99-100).

On May 13, 1943 the District Court made its Findings of Fact and Conclusions of Law (R. 101-104) and entered judgment (R. 105) against defendant and for plaintiff in the sum of $2,131.58, with interest thereon at 6 per cent from May 23, 1941, and dismissed intervenor's petition. The United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court (R. 115).

SPECIFICATION OF ERRORS TO BE URGED.

The courts below erred:

1. In failing to hold that the order of the Board of Tax Appeals dismissing the petition of H. C. Williams, Successor Assignee, etc., is *res judicata* of this action.

2. In finding and holding that H. C. Williams, Successor Assignee, etc., was operating the business or property of the Louisville Property Company so as to make him, or the trust of which he was trustee, taxable as a corporation under § 52 of the Revenue Act of 1936.

3. In failing to hold that the United States may not levy upon, distrain against, and seize the property of one taxpayer for the taxes of another wholly different taxpayer.

REASONS FOR GRANTING THE WRIT.

1. The petition should be granted to settle the status of a decision of the Board of Tax Appeals (now The Tax Court of the United States) as applied to other judicial proceedings. The question is recurring and of general importance to taxpayers.

2. In denying to the decision of the Board of Tax Appeals the same effect as a *res judicata* holding of a court, the decisions below conflict with *Cook* v. *United States*, 5 Cir., 108 F. 2d 804, and with *Greenbaum* v. *United States*, 84 Ct. Cls. 77, 17 F. Supp. 83. As the Circuit Court explained in its opinion (R. 121), it had in *Nachod & United States Signal Co.* v. *Helvering*, 74 F. 2d 164, questioned—

> whether decisions of the Board of Tax Appeals have the binding force required by the doctrine of res judicata, a doctrine applicable to decisions of courts.

3. The decision below has failed to accord to the findings of fact of the Board of Tax Appeals the effect prescribed by *Dobson* v. *Commissioner*, 320 U. S. 489. It having been suggested that the effect of findings of fact by the Board of Tax Appeals should be further clarified,[1] it is submitted that the petition should be granted not only for this purpose but also to fix the status of such findings as to collateral proceedings in which the doctrine of *res judicata* is invoked.

4. Insofar as the decision below was based on § 52 of the Revenue Act of 1936 it is in conflict with *Commissioner* v. *Merchants National Building Corporation*, 5 Cir., 131 F.

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[1] *Denholm & McKay Realty Co.* v. *Commissioner*, 1 Cir., 139 F. 2d 545, 550. Cf. *Security Flour Mills Co.* v. *Commissioner*, ... U. S. ...., 64 S. Ct. 596, 599; *Smith* v. *Helvering*, ... U. S. App. D. C. .... F. 2d ...., decided February 14, 1944; and *Helvering* v. *Insular Sugar Refining Corp.*, ...U. S. App. D. C. ...., ... F. 2d ...., decided March 27, 1944.

2d 740,[2] and this Court should grant the petition to resolve the conflict between the Circuit Courts.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Attorney for Petitioners.

May, 1944.

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[2] It is, however, apparently in accord on this issue with *United States* v. *Metcalf*, 9 Cir., 131 F. 2d 677, relied on by the Court below (R. 120).

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v.

UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions Below, Jurisdiction, Questions Presented, Statutes Involved, and Statement of the Case see pages 2 to 6 of the Petition.

1. The final decision of the Board of Tax Appeals involving the same parties, the same issue, and the same taxable year is res judicata in subsequent litigation between the parties.

This case involves the taxable year 1937. H. C. Williams, Successor Assignee, etc., filed a fiduciary income tax return for that year disclosing the income of his trust and paying the tax shown to be due of $361.65 (R. 91). Thereafter the Commissioner of Internal Revenue sent a statutory 90 day deficiency letter asserting additional tax at corporation rates to be due from the Louisville Property Co. pursuant to § 52 of the Revenue Act of 1936 (R. 22-26). H. C. Williams, Successor Assignee, etc., filed a petition with the Board of Tax Appeals "in so far as said notice of deficiency is held to assert a deficiency in tax against" him (R. 16). The Board thereafter dismissed the proceeding—

> for lack of jurisdiction in that the deficiency was determined against a corporation and the notice sent to a corporation in the care of an assignee, whereas the petition is filed by a wholly different person * * * (R. 29).

This most certainly was a determination that H. C. Williams, Successor Assignee, etc. (the petitioner) was not the Louisville Property Co. for the purpose of this tax litigation.

The Circuit Court sought to dispose of the issue by stating (R. 121-122):

> The theory of the 1937 case was that the deficiency notice having been mailed to the corporation, the corporation and only the corporation was liable for the tax. *Liability of the assignee under § 52 was neither asserted by the Commissioner nor considered by the Board member who heard the case.* (Italics supplied.)

Such is not the case. Liability under § 52 *was* asserted by the Commissioner (R. 24); was put in issue by paragraphs 4(a), (b), and (c), and 5(e) of the petition (R. 16-17, 19);

and, in view of the statements of counsel recited in the Board's "Order of Dismissal" (R. 28-29), it seems fair to assume that the issue was considered by the Board member.[3] Since the issue was in the case, the Commissioner was privileged to appeal the decision if dissatisfied and, having failed to do so, should not be heard now in a collateral attack on the decision of the Board.

In his petition to the Board, Williams had also assigned error on the part of the Commissioner regarding the amount of depletion allowable, the computation of capital gains and losses, and the allowance of a dividends paid credit (R. 17). Under the ruling of the Board, these issues were never considered.

After the Board's order of dismissal had become final, the United States brought the present action to enforce the surrender of funds on deposit to the credit of "H. C. Williams, Assignee, etc." in the National Bank of Middlesboro (R. 1-3). The Government thus attempted summarily to collect from Williams the 1937 taxes, the correctness of which Williams had sought to litigate before the Board (R. 16-26), if they were his taxes.

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[3] Any doubt about what consideration the Board member gave the matter is dispelled by reference to the record in the companion case of *Louisville Property Co.* v. *Commissioner*, which was decided with the instant proceeding (R. 116) and in which a petition for certiorari has also been filed. The entire oral argument before the Board is printed in that record on pp. 97-107. In that argument counsel for the Commissioner admits that H. C. Williams, Successor Assignee, etc., is "in a different capacity than the person to whom we sent the deficiency letter". (p. 99 of that record.) The Board member put the issue squarely up to counsel for the Commissioner as follows:

> You will either have to admit that the petition is properly filed here by the person that has filed it, or else insist, as you do, that it is not properly filed by the person to whom you mailed the notice, and you insist it is not. * * *
>
> But if you want to say the petitioner is a person against whom you want to assert the deficiency—collect the tax from him—then you will have to withdraw your motion and go to trial (p. 104 of that record).

The United States prevailed in the District Court (R. 101-105) and in the Circuit Court (R. 115-122). Williams is, therefore, in the position of having his money taken to pay taxes which the Board of Tax Appeals held *were not determined against him. Yet Williams went to the Board expressly to test the correctness of the deficiency if he was liable for it* (R. 16-21). It is an anomalous situation, when the law provides a trial tribunal where a person may go to determine his tax liability and when another trial tribunal can at will set aside the final determination of the first. Yet that is the present situation under the instant Circuit Court decision. The Board correctly ruled that if the Government wanted to collect corporate taxes from Williams, it should file an answer and go to trial on the merits in the proceeding before the Board. (See footnote 3 *supra.*)

Prior to the case at bar it was thought that the doctrine of *res judicata* applied to decisions of the Board of Tax Appeals. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, *Helvering* v. *Mitchell*, 303 U. S. 391, *Portage Silica Co.* v. *Commissioner*, 6 Cir., 89 F. 2d 958; Cf. *Pelham Hall Co.* v. *Hassett*, D. C. Mass., ... F. Supp. ...., decided March 23, 1944.

This Court has recently discussed the decisions of the Board of Tax Appeals and held in *Dobson* v. *Commissioner*, 320 U. S. 489, 499, that—

> Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts [than those of the Tax Court]. Consideration of uniform and expeditious tax administrations require that they be given all credit to which they are entitled under the law.

Since the Board determined and the Government admitted that no taxes were determined for 1937 against H. C. Williams, Successor Assignee, etc., should the Government be allowed to circumvent the Board proceeding by a collateral suit? Should the property of H. C. Williams, Successor Assignee, etc., be taken to pay taxes which the Com-

missioner admittedly assessed against a different entity? To do so abolishes the doctrine of *res judicata*, subjects taxpayers to a multiplicity of lawsuits, and destroys the purpose and usefulness of the Board (Tax Court).

2. Petitioner is taxable as a trust under § 161 of the Revenue Act of 1936 and not as a person "operating the property or business" of the corporation within the meaning of § 52 of that Act.

Section 52 provides that—

> *In cases where* receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. (Italics supplied.)

There must be *some* cases in which assignees do not operate the property or business of corporations. Otherwise Congress would not have used the words "in cases where", etc. It appears that the distinction lies between those cases where the corporation retains an interest (even though remote) in the properties and those where it has no further interest, as in the instant case. Surely, an assignee cannot be operating the property or business *of* a corporation when the corporation has *no* interest in the property.

There is also the question of whether the liquidating of assets is comprehended in § 52, or whether that is something separate and apart from "operating the property or business" of a corporation.

In attempting to bridge the hiatus between § 52 and § 161 of the Revenue Act of 1936, the Circuit Courts have not been consistent. In *Commissioner* v. *Merchants National Building Corporation*, 5 Cir., 131 F. 2d 740, the taxpayer received property of a corporation in trust to pay the debts and distribute the balance to the stockholders. The Board of Tax Appeals, 45 B. T. A. 417, and the Circuit Court, *supra*, held that the trust was not taxable as a corporation.

In the instant case, however, the District and Circuit Courts have held that the trust should be taxed as a corporation, when there are no material differences in the facts in the two cases.

The Circuit Court below was also considering the companion case of *Louisville Property Co.* v. *Commissioner* (R. 116), in which the Board had attempted to distinguish the *Merchants National Building Corporation* case on the ground that two steps were involved in that case even though, after the completion of the second step (within four months of the first step and in the same taxable year), the ultimate facts in the two cases were entirely analogous. (47 B. T. A. 23, 31; R. 80 of *Louisville Property Co.* case.)

The interpretation placed on § 52 by the Commissioner of Internal Revenue seems to be that *any* assignee in trust of a corporation, who is liquidating the assets for the benefit of creditors and stockholders, is taxable as a corporation, even though the corporation (as in the instant case) has no interest whatever in the assets or in the outcome. It appears that this Court has never construed the language of the section. Since it is a live question and of great public interest, it is believed that this Court should consider it and set the matter at rest.

CONCLUSION.

It is submitted that the determinations of fact of the Board of Tax Appeals are entitled to the finality on review which is accorded to final decisions of courts in applying the doctrine of *res judicata*.

It is believed, furthermore, that in drawing a line between § 52 and § 161 of the Revenue Act of 1936, liquidating trustees are taxable only under the latter provision.

Respectfully submitted,

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May, 1944.

APPENDIX.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 52. CORPORATION RETURNS.

Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title and such other information for the purpose of carrying out the provisions of this title as the Commissioner with the approval of the Secretary may by regulations prescribe. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer, assistant treasurer, or chief accounting officer. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

* * * * * * * * * *

SEC. 142. FIDUCIARY RETURNS.

(a) Requirement of Return.—Every fiduciary * * * shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title * * *.

* * * * * * * * *

SEC. 161. IMPOSITION OF TAX.

(a) Application of Tax.—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

* * * * * * * * * *

(b) Computation and Payment.—The tax shall be computed upon the net income of the estate or trust, and shall

be paid by the fiduciary * * *. For return made by beneficiary, see section 142.

* * * * * * * * * *

Internal Revenue Code:

SEC. 1117. REPORTS AND DECISIONS.

* * * * * * * * * *

(c) Date of Decision.—A decision of the Board [of Tax Appeals] (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

(d) Effect of Decision Dismissing Petition.—If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the record in the proceeding or unless the dismissal is for lack of jurisdiction.

* * * * * * * * * *

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

(a) Petition for Review Not Filed On Time.—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *.

* * * * * * * * * *

SEC. 1142. PETITION FOR REVIEW.

The decision of the Board rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Board prior to February 26, 1926) may be reviewed by a Circuit

Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

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LOUISVILLE PROPERTY COMPANY, H. C. WILLIAMS, Assignee,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, Louisville Property Company, H. C. Williams, Assignee, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled cause on February 7, 1944.

OPINIONS BELOW.

The opinions of The Tax Court of the United States (formerly the United States Board of Tax Appeals) are reported at 41 B. T. A. 1249 (R. 47-54) and at 47 B. T. A. 23 (R. 69-84). The opinion of the Circuit Court of Appeals (R. 160-166) is reported at 140 F. 2d 547.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on February 7, 1944 (R. 159). The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Was H. C. Williams, Assignee of property formerly belonging to Louisville Property Company, transferred to him in 1935 in trust for the benefit of the creditors and stockholders of said company, under court order, "operating the property or business" of Louisville Property Company in 1935 and 1936 under the provisions of § 52 of the Revenue Acts of 1934 and 1936 and, therefore, required to render income tax returns as a corporation rather than as a trust when admittedly said corporation divested itself of all property in 1919 and had no property or business in 1935 and 1936 and no interest in the said property?

2. Was a prior decision of the Board of Tax Appeals, to the effect that H. C. Williams, Assignee for the Benefit of the Creditors and Stockholders of Louisville Property Company, was a separate taxable person and entity from Louisville Property Company, binding and res judicata so as to prevent the Commissioner of Internal Revenue from collecting income taxes from the former which he assessed against the latter?

STATUTES INVOLVED.

The statutes involved are §§ 52, 142, and 161 of the Revenue Acts of 1934 and 1936 and §§ 1117, 1140, and 1142 of the Internal Revenue Code.

STATEMENT OF THE CASE.

The Louisville Property Company is a corporation organized in 1898 under the laws of Kentucky for the purpose of holding and dealing in real estate (R. 71).

In 1919 the Court of Appeals of Kentucky ordered that a receiver should be appointed and that the corporation's property should be sold and its affairs wound up. *Bernheim v. Louisville Property Co.*, 185 Ky. 63, 214 S. W. 801. The stockholders, directors, and creditors realized that receivership would prove expensive and that the stockholders might realize nothing through such procedure. They thereupon agreed upon a plan in lieu of receivership, whereby on November 6, 1919, all the assets of the corporation were conveyed in fee simple to the United States Trust Company of Louisville in trust for the payment of the debts of the corporation and the expenses of administration, with any remainder over to go to the then stockholders, or their assignees, at the time of distribution (R. 71-72; Ex. 1, R. 127-129). The corporation then published notice that it was closing up its business and winding up its affairs. Since that time the corporation has not owned any property and has not carried on any business, but the corporate charter has been kept alive for the sole purpose of keeping a record of the stockholders who would be entitled to the distributions if and when made (R. 73-74).

The United States Trust Company proceeded to dispose of the assets received by it as stated above and by 1935 had disposed of a large part of them and had applied the proceeds on the debts of the corporation. On May 11, 1935, it petitioned the Whitley Circuit Court of Kentucky to be relieved of its trusteeship. The petition was granted and the court appointed H. C. Williams as successor Assignee of the Louisville Property Company in substitution for the United States Trust Company. The Court ordered that the action be retained on the docket of the court for such further proceedings as might be necessary and for settlement of the accounts of H. C. Williams and that the action proceed under the style of "H. C. Williams, Assignee of the Louisville Property Company, plaintiff", etc. (R. 74, 117, 134-136).

H. C. Williams then proceeded to administer and dispose of the assets as he could without sacrificing them. In all transactions pertaining to said property he used the title "H. C. Williams, Assignee of the Louisville Property Company", prescribed by the Court (R. 74-75, 116-118).

Some of the lands transferred to H. C. Williams contained coal and he leased the coal to operators and received royalties on same, but he has never carried on any mining operations. He also sold standing timber from some of the lands, but he never cut or manufactured any timber himself and never carried on any timber operations (R. 75, 118-119).

Since his appointment, Mr. Williams has had no business connections or dealings with the Louisville Property Company. He was not a stockholder, director, or officer of the corporation when appointed and has not been since. He has made no report to the corporation and it has made no demands upon him and has never exercised any authority over the said properties. The reports which Williams has made were all made to the Whitley Circuit Court (R. 76, 119).

During the years 1935 and 1936 H. C. Williams realized taxable income on the properties which he administered. For each year he filed fiduciary income returns on Form 1041, in the caption of which he designated the trust as "Louisville Property Company" and the name of the fiduciary as "H. C. Williams, Assignee, Middlesboro, Kentucky". These returns disclosed net income in the amounts of $1,577.53 and $9,140.80, respectively. Said returns were only information returns required by law. (R. 77, 124, 149; Ex. 10, 151; Ex. A.)

For the years 1935 and 1936, H. C. Williams also filed income tax returns on Form 1040, the form prescribed for use by trustees in reporting their tax liability. These returns were filed in the name of "H. C. Williams, Assignee, Louisville Property Company" and disclosed tax liabilities of $23.14 and $614.11, respectively. Said taxes were paid

by Williams on March 26, 1936, and April 14, 1937, respectively. (R. 77, 124, 143; Ex. 3, 147; Ex. 9.)

Upon consideration of said fiduciary and income tax returns, the Commissioner of Internal Revenue determined that H. C. Williams was operating the business of Louisville Property Company and that the corporation should be taxed under the provisions of § 52 of the Revenue Acts of 1934 and 1936 (R. 20). On November 26, 1938, the Commissioner addressed a letter to "Louisville Property Company, H. C. Williams, Assignee, Middlesboro, Kentucky" in which he asserted deficiencies in income tax for 1935 and 1936 (computed on the corporation basis) (R. 18-24). Said letter was sent by registered mail and was received by H. C. Williams. He thereupon (on December 12, 1938) filed with the United States Board of Tax Appeals a petition in which he appealed from said deficiency notice *only* as trustee and successor trustee of the United States Trust Company of Louisville (R. 6-18, 125). Said petition was given Docket No. 96414 on the Board's Docket. Said petition alleged that "the petitioner is an individual * * * acting in a trustee capacity" (R. 7). Again it alleged (R. 16) that "The petitioner denies that he is acting in a corporate capacity". The petition was prepared and signed by one B. I. Dahlberg as counsel for petitioner (R. 17, 29, 125). B. I. Dahlberg was a certified public accountant (R. 124). The petition was verified by "H. C. Williams, Trustee Louisville Property Company" (R. 17-18).

On January 20, 1939, the Commissioner of Internal Revenue filed with the Board a "Motion to Dismiss" the aforesaid petition (R. 25).

On February 13, 1939, B. I. Dahlberg wrote a letter to the Clerk of the Board (R. 29-30) with which he transmitted another petition captioned "Louisville Property Company, H. C. Williams, Assignee, Middlesboro, Kentucky, Petitioner," etc. Said petition was "filed" by the Board on February 15, 1939, and given Docket No. 97126 (R. 30-34). It alleged, among other things, that "the petitioner is an

individual * * * acting in a trustee or assignee capacity" (R. 31); that "the petitioner is H. C. Williams, Trustee of Louisville Property Company or Assignee or whatever legal terms may be applied" (R. 32); and that "the petitioner denies that he is acting in a corporate capacity" (R. 32).

On March 3, 1939, the Board entered an order (R. 34-35) denying the Commissioner's motion to dismiss; ordering that the proceeding at Docket No. 97126, with all papers pertaining thereto, be transferred to and consolidated with the proceedings at Docket No. 96414; that Docket No. 97126 be closed of record; and that the proceeding proceed under the caption "Louisville Property Company, H. C. Williams, Assignee, Middlesboro, Kentucky, Petitioner", Docket No. 96414.

On March 20, 1939, the Commissioner filed an "Answer to Original and Amended Petitions" (R. 35-36).

On October 27, 1939, H. C. Williams filed with the Board of Tax Appeals a petition appealing from a similar deficiency letter for the year 1937 (R. 85-90). Said petition was captioned "H. C. Williams, Successor Assignee in Trust for the Benefit of the Creditors and Stockholders of Louisville Property Company, Petitioner" and was given Docket No. 100,467. Said petition alleged that it was an appeal from said deficiency letter "in so far as said notice of deficiency is held to assert a deficiency in tax against this petitioner" and that "the petitioner is a fiduciary". Said petition was verified by H. C. Williams as successor assignee in trust of the property of Louisville Property Company.

On November 27, 1939, the Commissioner of Internal Revenue filed a "Motion to Dismiss" the 1937 petition (R. 95-96). A hearing was had on said motion on December 20, 1939 (R. 96-107), in which the counsel for the Commissioner made it plain that the tax was asserted against the corporation and not against H. C. Williams, Assignee, who filed the petition. Thereupon the Board raised the question of its jurisdiction and on December 20, 1939, entered an

"Order of Dismissal" (R. 107-108), wherein it dismissed the proceeding because "the deficiency was determined against a corporation and the notice sent to the corporation * * *, whereas the petition is filed by a wholly different person". Said order of the Board was not appealed and became final on March 20, 1940.

Prior to the hearing on the merits of the 1935 and 1936 case, H. C. Williams by a proper pleading put in issue (R. 45) the question of whether the Board's determination in the 1937 proceeding (Docket No. 100,467) was final, res judicata, and binding on the Board (R. 37-47).

On May 24, 1940, the Board promulgated an interlocutory opinion on the question of jurisdiction (R. 47-54) wherein it held that the Board had jurisdiction. No mention was made in that opinion of the Board's action in dismissing the 1937 case for want of jurisdiction, although such dismissal had been pleaded and presented (R. 45).

After a hearing on the merits of the petition the Board on June 3, 1942, promulgated its "Findings of Fact and Opinion" (R. 69-84) and on September 3, 1942, it entered its "Decision" (R. 84). The Board held that the petitioner was the same party against whom the Commissioner determined the deficiencies for 1935 and 1936 and that H. C. Williams was operating the property or business of Louisville Property Company and should have rendered corporation returns under § 52 of the Revenue Acts of 1934 and 1936.

The United States Circuit Court of Appeals for the Sixth Circuit affirmed the decision of the Board.

The petition for review was filed in the Circuit Court and this petition for certiorari is being filed in the name of "Louisville Property Company, H. C. Williams, Assignee, Middlesboro, Kentucky, Petitioner," etc., because the Board ordered that the proceeding be carried on in that name (R. 34-35, 57). The petitioner is H. C. Williams, the successor assignee in trust of property of Louisville Property Company, designated by the Whitley Circuit Court of Kentucky as "H. C. Williams, Assignee of the Louisville Property Company".

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court erred:

1. In failing to hold that the order of the Board of Tax Appeals, dismissing the petition of H. C. Williams, Successor Assignee, etc., in the 1937 case, is *res judicata* of this action.

2. In finding and holding that H. C. Williams, Successor Assignee, etc., was operating the business or property of the Louisville Property Company so as to make him, or the trust of which he was trustee, taxable as a corporation under § 52 of the Revenue Acts of 1934 and 1936.

REASONS FOR GRANTING THE WRIT.

The reasons for granting the writ in this case are the same as those stated in the companion case of *National Bank of Middlesboro* v. *United States of America* decided with the instant suit and in which a petition for a writ of certiorari has also been filed. The attention of the Court is, therefore, respectfully invited to that petition and also to the brief in support of it for a discussion of the principles involved and the reasons for granting this writ.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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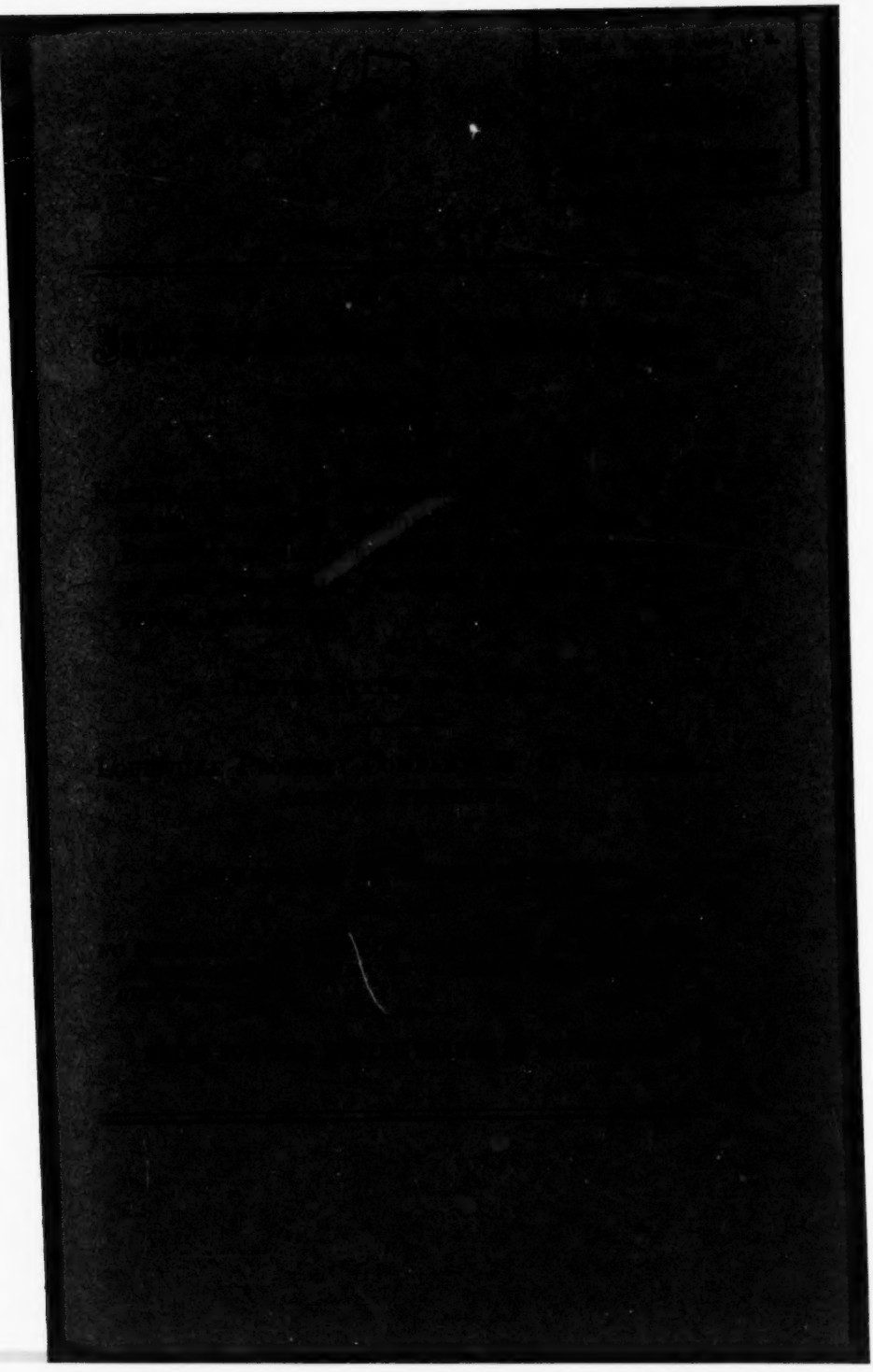
May, 1944.



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589435—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 971

NATIONAL BANK OF MIDDLESBORO AND H. C. WILLIAMS, SUCCESSOR ASSIGNEE IN TRUST FOR THE BENEFIT OF THE CREDITORS AND STOCKHOLDERS OF THE LOUISVILLE PROPERTY COMPANY, INTERVENOR, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 972

LOUISVILLE PROPERTY COMPANY, H. C. WILLIAMS, ASSIGNEE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

In No. 971 no opinion was rendered by the district court, but its findings of fact and conclusions

of law may be found at R. 101–104. The opinions of the Board of Tax Appeals in No. 972 are reported at 41 B. T. A. 1249 (R. 47–54) and 47 B. T. A. 23 (R. 78–84). The opinion of the circuit court of appeals covering both cases (No. 971, R. 116–122; No. 972, R. 160–166) is reported at 140 F. (2d) 547.

JURISDICTION

The judgments of the circuit court of appeals were entered on February 7, 1944 (No. 971, R. 115; No. 972, R. 159). The petitions for writs of certiorari were filed May 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

The questions presented in the two cases are the same:

1. Whether the assignee of the Louisville Property Company was "operating the business or property" of that company within the meaning of Section 52 of the Revenue Acts of 1934 and 1936 and so is liable for income tax on net income from such operations at the corporate rate.

2. Whether the dismissal by the Board of Tax Appeals of a prior proceeding involving petitioner's 1937 taxes was *res judicata* against the Government in these cases.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 15–16.

STATEMENT

These cases involve the liability for corporate income taxes, under Section 52 of the Revenue Acts of 1934 and 1936, of H. C. Williams, as assignee of the Louisville Property Company. In No. 972 petitioner is seeking to set aside a decision of the Tax Court, affirmed by the Circuit Court of Appeals, covering the tax years 1935 and 1936. In No. 971 petitioner is seeking to reverse the judgment of the United States District Court, affirmed by the Circuit Court of Appeals, allowing the United States to levy on bank deposits of Williams, assignee, for taxes for the year 1937. In each case the petitioner argues, on the merits, that Williams is not liable for corporation taxes, and also that a prior dismissal by the Board of Tax Appeals of his petition to review the 1937 assessment for lack of jurisdiction is *res judicata* in his favor.

The facts.—In order that the case may best be understood, the facts as found by the Board of Tax Appeals in No. 972 will be stated first.

The Louisville Property Company is a corporation organized in 1898 under the laws of Ken-

tucky and authorized by its charter to deal in all kinds of property (No. 972, R. 71).

Prior to 1919 one of the minority stockholders of the Louisville Property Company instituted a suit to annul a conveyance of corporate property made by the corporation and to wind up its affairs. The suit reached the Court of Appeals of Kentucky, and on May 23, 1919, the court held that the company had not been managed for the benefit of all the stockholders; that its property should be sold and its affairs should be wound up; and that to this end a receiver should be appointed to be under control of the court. (No. 972, R. 71–72.)

After this decision was rendered the stockholders, directors, and creditors realized that receivership might prove too expensive, so they agreed upon a plan, in lieu of receivership, whereby the corporation by deed of assignment executed November 6, 1919, conveyed all its assets in fee simple to the United States Trust Company in trust for the payment of the debts of the corporation and the expenses of administration, and the distribution of the remainder, if any, of the proceeds of the sale of the assignor's property to its stockholders ratably according to their holdings at the time such distribution was to be made. The corporation then published notice to the public that it was closing up its business and winding up its affairs. There-

after the Louisville Property Company, apart from its assignee or its successor assignee, had no assets, did not buy or sell any property, and carried on no business, but continued its corporate existence for the sole purpose of keeping a register of its stockholders for the transfers of shares so that the assignee or successor assignee might know the names of the stockholders to whom final distribution should be made. (No. 972, R. 72–74.)

After receiving the assets of the Louisville Property Company, the trustee proceeded to sell and dispose of them as fast as it could advantageously and to disburse the proceeds as provided in the deed of November 6, 1919 (No. 972, R. 74).

On May 11, 1935, after petition of the trustee, the Whitley Circuit Court of Kentucky appointed H. C. Williams, of Middlesboro, Kentucky, as successor assignee of the Louisville Property Company, under the deed of assignment, and directed that the action be continued on the docket under the style of "H. C. Williams, Assignee of the Louisville Property Company, plaintiff, versus Louisville Property Company, et al. etc." The court instructed Williams to continue to dispose of the assets, which were turned over to him, in an orderly manner and to report from time to time to the court the receipts and disbursements, and Williams has done this annually since that time, at the close of each year. (No. 972, R. 74.)

The property conveyed to Williams consisted of land and cash. Williams proceeded to liquidate

and dispose of the property as and when he could, advantageously and without sacrificing the property. At the time Williams was appointed successor assignee, there were only a few remaining creditors of Louisville Property Company and their claims were in dispute and in litigation. Williams has withheld any payment on them until the amounts due are finally determined. (No. 972, R. 75.)

Some of the lands transferred to Williams contained mineable coal. The coal rights have been leased to operators, who pay Williams royalties on the coal mined. Williams has never had any mining equipment and has never at any time carried on any mining operations on these lands. Other lands transferred to Williams had merchantable timber on them. Williams has never cut or manufactured any of the timber but did sell the standing timber whenever he could do so to an advantage. (No. 972, R. 75.)

In connection with his duties as "Assignee of the Louisville Property Company" Williams has maintained an office at Middlesboro, Kentucky, where he employs a secretary-bookkeeper. He also employs an engineer and a field man, who are required to look after and protect the properties and to inspect the coal mines from time to time. He rents any vacant buildings at the mines at a low rate in order to prevent their being destroyed or removed. (No. 972, R. 75–76.)

Williams has had no business connections or dealings with the Louisville Property Company since May 11, 1935, except as successor assignee of its properties; he has made no reports to it; and it has made no demands upon him with respect to his operations and has never exercised any authority over the properties (No. 972, R. 76).

Proceedings in No. 972—Tax years 1935 and 1936.—Williams filed fiduciary returns of income on Form 1041 for the years 1935 and 1936 in the name of Louisville Property Company, as the estate or trust, and the name of the fiduciary as "H. C. Williams, Assignee, Middlesboro, Kentucky." The returns disclosed net incomes of $1,577.53 and $9,140.80, respectively. Williams also filed individual income tax returns on Form 1040 for these years in the name of "H. C. Williams, Assignee, Louisville Property Company, Middlesboro, Kentucky", which return disclosed net income as stated and total tax liability of $23.14 and $614.11, respectively. These taxes were paid to the Collector for the District of Kentucky. The Commissioner determined that taxes should have been paid at the rate for corporations, and the taxpayer brought the case to the Board of Tax Appeals.

The Board found that during the years 1935 and 1936 H. C. Williams, successor assignee to

the United States Trust Company, was operating the property or business of the Louisville Property Company, a corporation in dissolution, as a successor assignee in trust for the benefit of the creditors and stockholders of the corporation, and, as such assignee, Williams should have made returns for the corporation in the same manner and form as corporations are required to make returns. (No. 972, R. 77.) Accordingly, it held on the principal issue here that the tax should be paid for those years at the corporate rate (No. 972, R. 84).

Proceedings in No. 971—Tax Year 1937.—A similar deficiency assessment for 1937 was made against the taxpayer, the notice being sent to "Louisville Property Company, H. C. Williams, Assignee" (No. 971, R. 16). In response to the notice, a petition challenging the deficiency was filed in the Board of Tax Appeals under the caption (*ibid.*):

> H. C. Williams, Successor Assignee In Trust For The Benefit Of The Creditors And Stockholders Of Louisville Property Company, Petitioner, v. Commissioner Of Internal Revenue, Respondent.

The Commissioner moved to dismiss, on the ground that the petition did not contain the proper caption (No. 971, R. 27–28). On December 29, 1939, the Board dismissed the proceedings for lack of jurisdiction on the ground that (*id.* at p. 29)—

> * * * the deficiency was determined against a corporation and the notice sent to the corporation in the care of an assignee, whereas the petition is filed by a wholly different person who does not claim to have any authority to act for the corporation.

No appeal was taken from this order.

On May 23, 1941, a notice of levy was served upon the National Bank of Middlesboro, Kentucky, notifying it that all bank deposits in its possession belonging to Louisville Property Company, H. C. Williams, Assignee, were seized and levied upon for the payment of the above tax and interest. At that time there were funds on deposit in this bank in the name of H. C. Williams, Assignee, Louisville Property Company. As the bank refused to surrender such funds, the Commissioner requested the Attorney General to institute this action against the bank to enforce the surrender of funds levied on. (No. 971, R. 102.)

The bank deposits which were levied on are proceeds realized from rents, royalties, and the sale of assets conveyed by Louisville Property Company, to the first assignee, the United States Trust Company, by deed of assignment dated November 6, 1919, and later transferred to H. C. Williams as Successor Assignee, pursuant to order of the Whitley Circuit Court entered in May 1935 (No. 971, R. 103).

Decisions below.—Both the District Court (No. 971, R. 104) and the Board of Tax Appeals (No.

972, R. 58–60) concluded that the dismissal of the petition for 1937 taxes by the Board was not *res judicata* as to the merits of the controversy, the Board stating explicitly that the questions before it in the two proceedings were not the same (*ibid.*). Both court (No. 971, R. 103) and Board (No. 972, R. 77–81) also found that Williams, as assignee, was conducting or operating the business of the Louisville Property Company, and that accordingly the taxes should have been paid on behalf of the corporation. As a consequence, Williams, as assignee, was liable for the claimed deficiency for 1935 and 1936, and the United States had the right to levy on his bank account as assignee for 1937 taxes. These rulings were affirmed by the Circuit Court of Appeals in a single opinion (No. 971, R. 115–122; No. 972, R. 159–166).

ARGUMENT

1. Section 52 of the Revenue Acts of 1934 and 1936, after stating that corporations shall file income tax returns, provides:

> In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the

corporations of whose business or property they have custody and control.

Williams here admittedly was an assignee, and the only question is whether he was "operating the property or business" of the corporation. On that issue of fact, the two lower courts in No. 971 and the Board and the Circuit Court of Appeals in No. 972 have all found that he was.

Petitioner argues that this is incorrect because the assets were assigned for purposes of liquidation. But the orderly liquidation of property, which includes, as here, the management for profit of assets which it is not advantageous to sell, may constitute the carrying on of business. Cf. *Magruder* v. *Washington B. & A. Realty Corp.*, 316 U. S. 69. The Treasury Regulations under Section 52 expressly so provide,[1] and the decision below to that effect is supported by *United States* v. *Metcalf*, 131 F. 2d 677 (C. C. A. 9), certiorari denied, 318 U. S. 769, and *State* v. *American Bonding & Cas. Co.*, 225 Iowa 638.

Petitioner asserts a conflict between these cases and *Commissioner* v. *Merchants National Building Corp.*, 131 F. 2d 740 (C. C. A. 5). The opinion of the court in that case stated merely that "cases of this nature must be decided upon their particular facts" and that it was confronted with findings of the Board of Tax Appeals which there was no basis for setting aside. The opinion

[1] See Treasury Regulations 94, Article 52–2, printed in the Appendix, *infra*, pp. 15–16.

of the Board, to which we are thus referred, states expressly that under the regulations and controlling decisions, the assignee would have been held taxable as a corporation if the transfer of assets had been "directly connected with a plan of dissolution." 45 B. T. A. 417, 425. The factor lacking in the peculiar circumstances of that case is present here. The Board in the instant case held not only that the *Merchants* case was distinguishable but that it supported a decision against the petitioner (No. 972, R. 80).

2. Petitioners contend that the dismissal by the Board of Tax Appeals of Williams' petition for a review with respect to the 1937 deficiency is *res judicata* in their favor in both actions and urge that an important issue is presented as to whether that doctrine applies to the Tax Court. The court below found it unnecessary to decide that general question; assuming that the doctrine applied, it held, as had the Board of Tax Appeals, that the issues ruled upon in the two cases were not identical (No. 971, R. 121; No. 972, R. 165). This decision was clearly correct.

The dismissal by the Board for want of jurisdiction of the petition relating to the 1937 deficiency was based upon the fact that the party to the deficiency notice was the corporation, in the care of its assignee, whereas the petition for review was filed by the assignee in trust for the benefit of creditors and stockholders, not for the corporation

(No. 971, R. 28–29). The petition in No. 972, relating to 1935 and 1936 taxes, was originally captioned "H. C. Williams, Trustee Louisville Property Company" (No. 972, R. 6), and the first amended petition was entitled "Louisville Property Company, H. C. Williams, Assignee" (No. 972, R. 30), a caption which was approved by the Board (No. 972, R. 34–35). Petitioner's subsequent motion (No. 972, R. 37) to change the caption to that which had by that time been held inadequate in the 1937 proceeding [2] was denied by the Board (No. 972, R. 47–55, 58–60). Thus in the 1935–36 case the petitioner before the Board was the party described in the deficiency notice, and the basis for the dismissal of the 1937 petition was lacking. A decision holding one caption improper is obviously not *res judicata* in a case bearing another caption.

It is also clear that the Board's holding that it had no jurisdiction of the 1937 case for the reasons mentioned did not foreclose the jurisdiction of the District Court in the suit brought by the United States. The petition (No. 971, pp.

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[2] The amended petition as to 1935–1936 taxes was filed February 15, 1939 (No. 972, R. 30), and the caption approved by the Board March 3, 1939 (No. 972, R. 34–35). The petition as to 1937 taxes, bearing a different caption, was filed October 27, 1939 (R. 972, R. 85), and dismissed for want of jurisdiction because of the caption December 20, 1939 (No. 972, R. 107–108). The motion to change the caption in the first proceeding to that held improper in the second was filed February 19, 1940 (No. 972, R. 37).

10–12) seems to treat the Board's order of dismissal as a decision on the merits of the controversy binding on the District Court. But the order was not a determination that Williams was not an assignee "operating the property or business" of the corporation within the meaning of Section 52, which is the issue presented on the merits. The decision on the motion was based on the form of the pleadings, which were all the Board had before it at that time, not upon the nature of the relationship between Williams and the company. The question as to whether the prior proceeding involved the identical issue has now been decided adversely to petitioner by three tribunals and is obviously not of general importance.

CONCLUSION

The decisions below are correct, and there is no conflict. The petitions for certiorari should be denied.

Respectfully submitted.

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MAY 1944.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 52. CORPORATION RETURNS.
>
> Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title and such other information for the purpose of carrying out the provisions of this title as the Commissioner with the approval of the Secretary may be regulations prescribe. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer, assistant treasurer, or chief accounting officer. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

> ART. 52–2. *Returns by receivers.*—Receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the

property or business of corporations, must make returns of income for such corporations. If a receiver has full custody of and control over the business or property of a corporation, he shall be deemed to be operating such business or property within the meaning of section 52, whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for purposes of liquidation. Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the receiver, trustee, or assignee, subject to the order of the court, such receiver, trustee, or assignee stands in the place of the corporate officers and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control. * * * A receiver in charge of only part of the property of a corporation, however, as, for example, a receiver in mortgage foreclosure proceedings involving merely a small portion of its property, need not make a return of income.

U. S. GOVERNMENT PRINTING OFFICE: 1944